

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 31**

SUNBRIDGE BRASWELL ENTERPRISES, INC.,  
d/b/a SIERRA VISTA, Employer<sup>1</sup>

and

31-RC-093728

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 121RN, Petitioner

**DECISION AND DIRECTION OF ELECTION**

**I. INTRODUCTION**

**A. The Petition**

On November 26, 2012, Service Employees International Union, Local 121RN (Petitioner) filed petition 31-RC-093728 under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of all Registered Nurses (RNs) employed by Sunbridge Braswell Enterprises, Inc. dba Sierra Vista (Sierra Vista or Employer) at 3455 East Highland Avenue, Highland, California.

A hearing was held on December 7, 2012, on the petition referenced above. The sole issue presented at the hearing was whether the RNs are supervisors within the meaning of Section 2(11) of the Act and should, therefore, be excluded from the bargaining unit.

As more fully described below, it is the Employer's position that the five individuals employed by the Employer as RNs are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the unit. The Petitioner contends

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<sup>1</sup> The name of the Employer appears as corrected at the hearing.

that the five RNs are not 2(11) supervisors and should be included in the petitioned-for bargaining unit.<sup>2</sup>

For the reasons set forth below, I conclude that the RNs are not supervisors within the meaning of Section 2(11) of the Act and I will order an election as set forth below.

**B. Findings**

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

Hearing Officer Rulings: The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Jurisdiction: The Parties stipulated and I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purpose of the Act to assert jurisdiction in this matter.<sup>3</sup>

Labor Organization: The Parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

Question Concerning Commerce: A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.<sup>4</sup>

Appropriate Unit: The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act (Unit):

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<sup>2</sup> At the hearing, the Parties stipulated that the Employer's Director of Nursing (DON) and Assistant Director of Nursing (ADON), who are both Registered Nurses, are not included in the petitioned for unit and are supervisors within the meaning of Section 2(11) of the Act.

<sup>3</sup> The Employer, Sunbridge Braswell Enterprises, Inc. dba Sierra Vista, a California corporation, with its place of business located at 3455 East Highland Avenue, Highland CA 92346, is engaged in providing mental healthcare. During the past 12 months, the Employer has received gross revenue in excess of \$250,000 and during the same period, has purchased and received goods in excess of \$5,000 from suppliers located outside the State of California.

<sup>4</sup> The Parties stipulated and I find there is no contract or any other bar that would preclude the processing of this petition.

**INCLUDED:** All registered nurses employed by the Employer at 3455 E. Highland Ave., Highland, California.

**EXCLUDED:** The Director of Nursing, the Assistant Director of Nursing, all other employees, guards and supervisors as defined in the Act.

## **II. FACTS<sup>5</sup>**

### **A. Background**

Sierra Vista is a skilled nursing facility licensed by the State of California. It is certified by the California Department of Mental Health and classified as an Institution for Mental Disease. Sierra Vista has 116 beds and houses adult residents for periods ranging from six months to several years.

The residents are organized and housed into two separate units. Unit 1 is a 45-bed unit, composed of residents whose primary diagnosis is an intellectual disability or a dual diagnosis of mental illness and intellectual disability. Unit 2 is a 71-bed unit and is a correctional program. Some residents in Unit 2 have criminal backgrounds and anti-social personality disorders. Unit 2 includes residents who were placed at Sierra Vista by case managers from the Department of Mental Health, conservators, or pursuant to court order.

Sierra Vista is a secured facility and ingress and egress for the Units is only available through locked doors. Only staff members have keys to enter or exit the facility. Residents are ambulatory and allowed to walk around the Unit to which they are assigned, but they may not go outside onto the patio areas, which are surrounded by 12-foot fences, without staff supervision.

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<sup>5</sup> The Employer presented two witnesses, Administrator Elsie Barton and ADON Kristen Figueroa to testify as to RNs' responsibilities vis-à-vis other employees in the Nursing Services department. Administrator Barton estimated that she spends about an hour each weekday in the Units. ADON Figueroa is "frequently" on the floor; however, she regularly works outside the Units in the Administration office or Medical Records, or is away from the facility. The Employer also presented various documents, including schedules, assignment sheets, incident reports, and the RN job description. The Petitioner presented the testimony of one RN from the petitioned-for unit.

The Employer's organizational chart reflects the following hierarchy. Sierra Vista's Administrator, Elsie Barton, is responsible for overseeing operations. The operation is organized into seven departments, whose heads report directly to Administrator Barton: Nursing Services, Nutritional Services, Environmental Services, Business Operations, Social Services, Primary Counselor/Quality Assurance, and Special Treatment Programs. Joyner Hillyard is the Director of Nursing (DON) and oversees the Nursing Services department. There are eight classifications in the Nursing Services department, including, but not limited to the Assistant Director of Nursing (ADON), RNs, Licensed Vocational Nurses (LVNs), and Certified Nursing Assistants (CNAs) – each of these positions reports directly to the DON. In addition to reporting directly to the DON, the LVNs also report to the RNs, and the CNAs also report to both LVNs and RNs.<sup>6</sup>

Sierra Vista employs 5 RNs, 10 LVNs, and 45-50 CNAs. Recently, another Service Employees International Union local was certified as the exclusive representative of a bargaining unit consisting of the Employer's LVNs and CNAs employed at the facility.<sup>7</sup>

#### **B. Scheduling and Daily Assignment Sheets**

The Employer operates 24 hours a day and seven days a week and both units are staffed around-the-clock. On weekdays, there are three shifts per day for LVNs and RNs: 6:00 AM – 2:30 PM (the AM shift); 2:00 PM until 10:30 PM (the PM shift); and 10:00 PM until 6:30 AM (the NOC shift).<sup>8</sup> On weekends, there are two twelve hour shifts (6:00 AM – 6:00 PM; 6:00 PM to 6:00 AM). These schedules are set by the Employer's corporate office and do not change. Nursing Services employees are scheduled by the DON and ADON, who prepare a six-week staffing schedule for the two Units.

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<sup>6</sup> Although the organization chart also shows that Licensed Psychiatric Technicians as reporting to RNs and the DON, the Employer does not employ anybody in that classification.

<sup>7</sup> The Record does not reflect which SEIU local represents that unit or when it was certified.

<sup>8</sup> CNAs also work three weekday shifts, but they start 30 minutes later than the RNs and LVNs: 6:30AM to 2:30PM; 2:30PM to 10:30PM; and 10:30PM to 6:30AM.

The DON and ADON work Monday through Friday from 9:00AM to 5:30PM (or shortly thereafter). In their absence (after approximately 5:30 on weekdays and on weekends), the RN on duty is designated as the House Supervisor or person in charge.<sup>9</sup> However, the DON remains on-call at all times. When visitors come to the facility while an RN is serving as the House Supervisor, the RN decides whether or not the visitor will be allowed into the facility.

At any given time, there is one RN scheduled (who splits her shift between the two Units); two LVNs (one in each of the Units); and four to six CNAs in each Unit. RNs move between the Units to cover for LVNs during their break and meal periods since both Units are required to have a licensed nurse (either RN or LVN) present at all times. The RNs' shifts include a half-hour overlap at the weekday shift changes to allow the outgoing RN to update the incoming RN of incidents or events that occurred during the prior shift and to notify her of other issues of which she should be aware.<sup>10</sup> While RNs are typically scheduled to work five hours per shift in Unit 2 and three hours in Unit 1, the amount of time the RN actually spends in a particular Unit will vary depending upon the number and severity of incidents that occur during the shift in the Units.

Based upon the six-week staffing schedule they create, the DON and ADON also prepare daily assignment sheets. Daily assignment sheets, which are posted in each Unit for each shift, serve as a sign-in sheet for staff members who are assigned to work that day. Employees sign the sheet next to their name when they arrive at work. On the daily assignment sheet, RNs are designated as "House Supervisor RN1" and LVNs are designated as "Charge Nurse LVN/LPT1." Each assignment sheet has between four to seven positions for CNAs depending upon the shift, that are designated sequentially as "Certified Nurse Assistant CNA1", "Certified Nurse Assistant CNA2," etc.

In addition, the daily assignment sheet has an assignment column. This column is blank for RNs and LVNs, but has pre-printed information for each of the CNAs. For

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<sup>9</sup> The RN is also referred to as the House Supervisor or Manager-on-Duty when the DON and ADON are not present.

<sup>10</sup> The record does not indicate whether LVNs provide similar updates at shift changes.

each CNA position (*i.e.*, CNA1, CNA2, etc.), the assignment column sets forth daily responsibilities and assignments for that position. For example, the daily assignment sheet for the AM shift on November 20, 2012 in Unit 1 sets out the following pre-printed daily assignments, meal and break periods for CNA1:

- Meal/Corridor Line
- Vital Signs
- Code-Clear/Secure Rooms/Offices/Areas
- ADL-ADL Boxes/ADL Room
- Break/Corridor Line
- Towels
- Break - 9:00-9:15; Meal 10:00-10:30; Break 1:15-1:30.<sup>11</sup>

### **C. RN Job Description**

According to the RN job description, one of the core competencies for the position is the ability to supervise other employees. The Employer's job description also lists various responsibilities for RNs, including:

- Supervises and directs subordinate employees in their work, in the interest of the employer, using independent judgment and discretion, regarding duties. Initiates and executes constructive discipline and performance evaluations in accordance with the SunBridge Human Resource policies and procedures.
- Completes routine rounds during shift to assess residents and to determine if nursing needs are being met in accordance with the resident's request and ensure nursing service personnel are performing their work assignments in accordance with acceptable nursing standards.
- Coordinates and supervises Nursing assistant, State Approved resident assignments, daily tasks and special duties (*i.e.*, passing nourishments, dining room assignments, etc.).

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<sup>11</sup> The Daily Assignment sheet does not state when RNs or LVNs take their breaks.

- Functions as house supervisor during off hours (evenings, weekends, and holidays).

#### **D. Directing and Assigning**

The RN can see from the daily assignment sheet which CNAs and LVNs are on duty and the daily assigned tasks for each CNA. If the CNA is not performing tasks as set forth on the daily assignment sheet, either the RN or the LVN may “prompt” or remind the CNA of the assigned tasks. For example, the RN or LVN might tell a CNA to bring medication to a resident or begin the showers. RNs may assign CNAs tasks in addition to those that appear on the daily assignment sheet. However, the record does not reflect whether or how often RNs reassign CNAs tasks different from their scheduled tasks. Nor does the record reflect how RNs select CNAs to perform such tasks.

If a CNA is not where he/she is assigned to be, either the RN or the LVN can page the CNA to come to the nurses’ station and inquire into this absence. There is no evidence in the record that RNs have been disciplined or held accountable for CNAs’ failure to adequately perform their tasks or to be at their assigned post.

RNs ensure that the LVNs administer medications correctly and use the Medication Administration Record. There is no evidence that RNs have ever been held accountable for the LVNs’ performance of this, or other duties.<sup>12</sup>

RNs transfer CNAs from one Unit to the other approximately once per week. While no specific evidence was adduced concerning instances when this has occurred, one witness explained that RNs might transfer CNAs from one Unit with extra staffing to a Unit that is understaffed as the result of an employee calling off of work that day, or that RNs might switch CNAs from one Unit to the other Unit, depending on the RNs’

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<sup>12</sup> The primary responsibility of the LVNs is the administration of medication for the Unit. LVNs take blood pressure prior to administering blood pressure medication. Labs are drawn and medication is administered in a designated location in the Unit. LVNs also do weekly summaries on residents, encourage residents to attend daily activities and meals, interact with residents’ families, conservators, and receive and carry out orders from physicians.

judgment. The record does not reflect the factors RNs rely upon to decide which employees to transfer and why.

RNs also have the authority to choose a staff person to accompany a resident who has to leave the facility during the day for an appointment. If a CNA has not already been designated by the ADON or DON, the RN will choose a staff person to accompany the resident. This could be either a CNA or a member of the programming staff. The RN chooses the staff person based on whom the resident has the best rapport with. The record is silent as to how the RN determines the level of rapport between particular resident and staff member and as to how often the RN assigns CNAs to accompany residents to appointments. Employer witnesses testified that if a CNA is absent from a Unit to accompany a resident to an appointment outside of the facility, the RN may reassign tasks to other CNAs to ensure the assigned tasks are completed. Again, the record contains no specific evidence in support of this assertion.

#### **E. RNs' Role in Disciplining and Coaching**

According to the RN job description, RNs have the authority to “initiate and execute constructive discipline.” However, Administrator Barton testified that the practice at Sierra Vista is for the DON and ADON to issue discipline to employees after receiving information from the RN and that no RN has signed a disciplinary write-up. There is no evidence that any written discipline has been issued to any employee based upon the recommendation of an RN. The record reflects one instance where an RN verbally warned an employee who was sleeping on the job.

RNs provide employees with verbal coaching, such as to correct a CNA who is improperly taking a resident's blood pressure or other vital signs. Coaching is not considered to be discipline. When residents need to be physically restrained, the RNs are responsible for ensuring that this is done correctly and will supervise whoever performs the restraint (whether it is the LVN, the Administrator, or staff from another department). If any member of the staff restrains a patient incorrectly, the RN will whisper into the ear of the employee how to correct the restraint.



## **F. Suspension of Employees**

The record reflects specific evidence concerning two instances when RNs were involved in situations where employees were suspended.<sup>13</sup> The first of these two incidents occurred in approximately January 2012. An RN was making rounds and could not locate one of the CNAs on duty.<sup>14</sup> The CNA was subsequently located with a resident in the resident's bathroom. The RN suspected abuse, removed the CNA from the floor, interviewed the CNA, and then phoned Administrator Barton, who serves as the facility's Abuse Coordinator. The CNA was then suspended and escorted out of the facility. While Administrator Barton testified that the RN removed the CNA from the floor, the record does not reflect who made that decision to suspend the CNA or when it was made.

The second incident took place within the six months prior to the hearing. The RN who was involved in that incident testified at the hearing that she received a call from the charge nurse (LVN) reporting a CNA had pushed a resident. The RN went to the unit and interviewed the resident, the CNA, and witnesses, and then called Administrator Barton, the Abuse Coordinator.<sup>15</sup> According to the RN, Administrator Barton instructed the RN to take the CNA's keys and badge, escort the CNA out of the building, and tell the CNA of a suspension pending investigation.<sup>16</sup>

Under the Employer's abuse policy, all employees are mandated reporters of suspected abuse. Where abuse is alleged, the RN is to separate the employee from the resident(s) and contact the Abuse Coordinator, Administrator Barton. If the incident

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<sup>13</sup> In addition to the two specific instances described above, the ADON testified that an actual example of an RN suspending someone "can be a CNA falling asleep on the NOC shift" five minutes after being verbally warned and that such conduct constitutes gross misconduct. While specific evidence concerning such an incident was not presented, the ADON testified that in these circumstances the RN would notify the supervisor and let the employee know they were suspended. The testimony is unclear whether this referred to one or more incidents and, if so, when such an incident occurred.

<sup>14</sup> The RN is no longer employed by Sierra Vista.

<sup>15</sup> The RN did not specifically testify that she removed the CNA from the floor.

<sup>16</sup> Administrator Barton contends that the RN's removal of the CNA from the unit was tantamount to suspension.

occurs during Administrator Barton's office hours, she takes over the investigation from the RN. If the Abuse Coordinator is unavailable, the RN is to contact the Assistant Administrator. If neither is available, the RN has authority to tell the employee to leave the building. The LVN also has this authority.

#### **G. Responding to Requests for Time off**

If a CNA or an LVN wants to leave the floor mid-shift, the CNA will notify the RN, and the RN will then notify the DON or ADON. While the Administrator and ADON asserted that the RN is authorized to allow the CNA to leave the floor, no evidence was provided concerning any instance when an RN has actually done so. The sole RN who testified at the hearing does not let anyone leave the floor without first notifying the DON or ADON in order to be certain that the Employer has coverage. If a CNA calls in sick, the RN will check the schedule to see what kind of staff coverage exists on the schedule, and will check with the DON or ADON with regard to authorizing overtime.

#### **H. Security and Safety**

Security and safety concerns at Sierra Vista are a shared responsibility. CNAs do resident checks hourly throughout the day and an RN or LVN will sign off to confirm the CNA has completed these rounds and verified that all residents are in the building.

Incidents such as a falls, fights, and injuries occur regularly. In an average month, there are approximately 100 incidents in the Units. Various staff members, including CNAs, LVNs, RNs, programming employees, or the Administrator may be involved in responding to an incident, depending on when and where it occurs. Staff members should notify the RN immediately when an incident occurs so that the RN can assess the situation. If the RN is in the other Unit when an incident occurs, a staff member will call the RN and the RN will go to the Unit where the incident occurred. If the incident requires a restraint, a licensed nurse (LVN or RN) has to supervise.

An Incident Packet must be submitted for each incident. Generally, the RN will fill out the Incident Packet, but all staff members can and do fill out incident reports and other paperwork in an Incident Packet. The RN signs the incident report as the “Supervisor.” In the event that the RN determines that a resident is injured and requires a doctor’s care, the RN is responsible for contacting a doctor to obtain an order to send the injured resident to a hospital. The record contains no evidence reflecting specific instances when this occurred. Nor does the record reflect any instance where an RN has directed other employees in coordinating a response to an incident.

### **I. Other Indicia**

The record shows that RNs do not have authority to hire, do not sit in on interviews, and do not have authority to fire. RNs do not conduct performance evaluations for other employees or have any input into those performance evaluations. RNs do not promote other employees, transfer employees from shift to shift, grant vacation requests, or adjust employee grievances.

RNs are paid on an hourly basis and earn between \$28.00-\$30.00 per hour. LVNs earn between \$17.00-\$19.00 per hour. CNAs earn approximately \$9.00-\$12.00 per hour. The DON and the Administrator are both salaried employees.<sup>17</sup>

The DON, ADON, RNs, and LVNs have keys to the Medication Room. The DON, ADON, and RNs have keys to the Laundry Room, and Supply Room, but the LVNs do not. CNAs do not have any these keys. No evidence was presented as to how often these keys are used by the RN or requested by LVN or CNA staff.

The Employer presented evidence that RNs attended the California Sexual Harassment Prevention Training. While it is clear that CNAs do not attend this training, the record is unclear as to whether LVNs attend.

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<sup>17</sup> The record does not reflect whether the ADON is salaried or hourly.

#### IV. ANALYSIS

##### A. Standard for Supervisory Status

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines the term “supervisor” as:

any individual having the authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely route or clerical nature, but requires the use of independent judgment.<sup>18</sup>

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has authority either to perform a supervisory function or to effectively recommend the same.

The Board has reaffirmed that the burden to provide supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River*, 532 U.S. at 711-712. Further, the party asserting supervisory status has the burden of proving that these requirements are met by a preponderance of the evidence *Oakwood Healthcare*, 348 NLRB at 687, 694; *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). In addition, it is well established that purely conclusory evidence is not sufficient to establish supervisory status. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare*

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<sup>18</sup> No evidence was presented at the hearing showing that RNs layoff or recall, adjust grievances, promote or reward, grant time off or grant wage increases to employees.

*Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without specific explanation are not enough).

The Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term “supervisory” too broadly. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). To separate straw bosses from true supervisors, the Act prescribes that the exercise of supervisory indicia be in the interest of the employer and requires the use of independent judgment. Thus, “the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988); *Feralloy West Co.*, 277 NLRB 1083, 1084 (1985).

Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest Healthcare Center*, 348 NLRB at 731; *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). Finally, “whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); see also *Springfield Terrace Ltd.*, 355 NLRB NO. 168, slip op. at 6 (2010) (inconclusive or contradictory evidence is insufficient to establish supervisory status).

It is uncontested that RNs here do not have the authority to hire, promote, discharge, or adjust grievances of other employees. Further, the record contains no evidence that RNs layoff, recall, or reward employees. Accordingly, the discussion below focuses on the Employer’s contention that the RNs are statutory supervisors because they have the authority to assign, responsibly direct, transfer, discipline, and suspend other employees.

## **B. Assignment of Work**

The Board in *Oakwood Healthcare* defined assigning work as the “act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.*, tasks to an employee.” 348 NLRB at 689.

### **Time**

The RNs have no authority to appoint employees to shifts or overtime periods. Rather, the Employer’s corporate office created the schedules for the facility, setting up three shifts per day during weekdays and two shifts per day during the weekends. The DON and ADON assign Nursing Services department employees to shifts for a six-week period. While the Employer contends that the RNs approve overtime, the record reflects no instance where an RN has authorized overtime for LVNs or CNAs without first checking with the DON or ADON.

### **Place and Tasks**

In *Oakwood Healthcare*, the Board found that emergency room charge nurses designated nursing staff to geographic areas within the emergency room. The Board found that the assignment of nursing staff to specific geographic locations within the emergency room fell within the definition of “assign” for purposes of Section 2(11). *Oakwood Healthcare*, 348 NLRB at 695. Here, the DON and the ADON designate CNAs and LVNs to work in particular Units. Moreover, the pre-printed daily assignment sheet contains pre-printed assignments for each CNA scheduled to work. RNs are not involved in assigning CNAs to any schedule or particular CNA position (such as CNA1, CNA2, etc.).

The Employer’s assertion that RNs will at times assign a CNA to work in a Unit other than the Unit to which the CNA had been assigned is unsupported by any specific evidence. Even if the Employer had provided specific evidence to support the conclusory testimony that RNs transfer CNAs from an overstaffed Unit to an understaffed Unit, such transfers do not establish supervisory status. The reassignment of a CNA from one

nursing unit that is overstaffed to another that is understaffed involves nothing more than the “mere equalization of workloads” and does not involve the exercise of independent judgment. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Oakwood Healthcare*, 348 NLRB at 689. Similarly, while the Employer contends that RNs utilize independent judgment in making determinations to switch CNAs between the Units, it provided no examples evidencing what factors RNs purportedly rely upon to make such determinations. Absent specific examples of instances when RNs have transferred CNAs, including the process they followed for doing so, I cannot conclude that the Employer has satisfied its burden of establishing that RNs utilize independent judgment to assign other employees to work in particular places. *Lynwood Manor*, 350 NLRB 489, 490 (2007) (conclusory testimony that nurses assessed “patient acuity” to make staffing decisions was insufficient to establish the nurses exercised independent judgment).

With respect to the RNs’ selection of CNAs to accompany residents to outside appointments, again no specific examples were included in the record. Rather, the witnesses provided only general and conclusory testimony that RNs will at times make such a selection based upon which staff member the resident has a good rapport with. Notably, the record does not reflect that the RNs made selections based upon an assessment of the severity of the resident’s conditions or the special skills of the CNAs. *Bryant Health Center, Inc.*, 353 NLRB 739, 743 (2009) (finding insufficient evidence that licensed practical nurses assigned work where no showing that they took into account employee skill or the nature or severity of the patient’s conditions when making assignments). Also, the record does not establish that RNs select staff members to accompany residents to outside appointments with any regularity. Given the lack of specifics in the record, the evidence does not establish that this selection constitutes assignment of work as contemplated in *Oakwood Healthcare*.

Further, I find no evidence in the record to support the Employer’s contention that RNs issue assignments to staff members in coordinating incident responses. Nor is there evidence that RNs utilize independent judgment in considering each staff members’ individual training and residents’ needs when responding to incidents that occur at the

facility. Rather, the only specific evidence provided in this regard were the incident reports that were filled out by the RNs. However, nothing in those reports, or in the testimony provided during the hearing, described specific instances where RNs coordinated responses to incidents or directed other staff members in responding to incidents.

Based on the record as a whole, I conclude that the Employer has not met its burden of establishing that RNs assign work to other employees as contemplated in Section 2(11) of the Act.

### **C. Responsible Direction**

In the healthcare setting, “direction” may be established by evidence that the RNs oversee CNA’s job performance or direct them to perform certain tasks, such as clipping residents’ toe and fingernails. *Golden Crest Healthcare Center*, 348 NLRB at 730. Here, the record establishes that RNs monitor the assignments given to CNAs, correct their work, give them verbal coachings, and sign off their hourly resident checks. Accordingly, RNs have the authority to direct the work of the CNAs.<sup>19</sup> The critical question is whether the direction is responsible.

For direction to be responsible, the person directing must have oversight of another’s work and be accountable for the other’s performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others’ deficiencies. *Oakwood Healthcare*, 648 NLRB at 691-692, 695. Here, the record contains no evidence that the Employer has taken any action that affects an RN’s terms and conditions of employment, either positively or negatively, based upon the performance of those whom the RN directed in the performance of work. In support of its contention that RNs are held accountable for the job performance of CNAs and LVNs, the Employer relies solely on the fact that the RN job description lists directing activities a

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<sup>19</sup> The record does not reflect evidence to establish that RNs direct the work of LVNs.



responsibility of the job. The Employer provided no record evidence that any RN has ever been disciplined based upon activities performed by CNAs or LVNs. Nor did the Employer provide evidence that the RNs are even evaluated on this basis in performance reviews. In *Golden Crest Healthcare Center*, the Board found that the employer had failed to establish sufficient accountability even though the nurses' performance evaluations contained ratings in the category "Directs CNAs." 348 NLRB at 731. The Board held that absent evidence that ratings given to nurses in this category had any impact on the nurses' terms and conditions of employment, the evidence was insufficient to establish that nurse were accountable for directing other employees. *Id.* Thus, the conclusory statement from the job description relied upon by the Employer here falls far short of establishing responsible direction. *Training School Vineland*, 332 NLRB 1412, 1416 (2000) (job descriptions alone are mere "paper authority" and are insufficient to establish supervisory indicia). Accordingly, I conclude that there is insufficient record evidence that RNs responsibly direct other employees.

#### **D. Discipline**

The Employer contends that RNs are authorized to issue and effectively recommend discipline of employees. However, the evidence does not support this contention. To the extent that the Employer cites testimony regarding verbal coaching given by RNs to CNAs and LVNs, the ADON testified that the RNs' verbal coaching does not constitute discipline. While the record reflects one instance when an RN issued a verbal warning to an employee who was sleeping on the job, the record reflects few details concerning that situation, such as when it occurred or who was involved. The record reflects no instance where an RN issued a written warning. While the Administrator testified that the ADON and DON relied upon the recommendations of RNs concerning discipline, no specific evidence was adduced in this regard. Given the lack of evidence concerning the involvement by RNs in discipline, the language from the job description concerning RNs' authority to initiate and execute constructive discipline is not dispositive. *Springfield Terrace Ltd.*, 355 NLRB No. 168, slip op. at 9 (2010) (job

descriptions reflecting nurses' authority to discipline was "mere paper authority" and insufficient in itself to establish supervisory authority). With respect to the one verbal warning for sleeping on the job, there is no evidence that this warning had any adverse impact on an employee's employment status. Moreover, the record reflects that the Employer considered such conduct to be gross misconduct. It is well-settled that disciplinary action taken in response to gross misconduct or flagrant violations does not evidence that the action was taken utilizing independent judgment. *Heritage Hall*, 333 NLRB 458, 460 (2001) (disciplinary action taken in response to gross misconduct is routine in nature); *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 11396 (1999) (authority limited to situations involving flagrant and egregious conduct does not establish supervisory authority).

#### **E. Suspension**

The Employer further asserts that the RNs have the authority to suspend employees and, on two separate occasions in 2012, exercised this authority. The evidence presented at the hearing concerning the RNs' role in these suspensions, however, is inconclusive. In both instances, the RN consulted with Administrator Barton, the Employer's Abuse Coordinator, prior to suspending the employee. In one of the situations, the RN reported the incident to Administrator Barton, who made the ultimate decision to suspend the CNA. In the other instance, it is not clear whether Administrator Barton or the RN made the decision to suspend the CNA. The Employer supplied no written documentation to corroborate its position that the RNs made the decision to suspend employees in either instance. Accordingly, the evidence is insufficient to establish that RNs made the decision to suspend employees or effectively recommended that employees be suspended in these incidents. To the extent that the evidence might be considered to be in conflict or otherwise inconclusive, it is insufficient to establish supervisory status. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Moreover, even if the RNs had made the decision to suspend the CNAs, the issue of abuse was present in both situations. Sending an employee home because of patient

abuse does not establish supervisory status. *Regal Health and Rehabilitation Center*, 354 NLRB No. 71, slip op. at 16 (2009) (upholding ALJ's finding that nurses were not supervisors despite evidence they could send employees home for patient abuse). Suspending employees for offenses that are "obvious violations of the employer's policies and speak for themselves" do not demonstrate the exercise of independent judgment. *Children's Farm Home*, 324 NLRB 61, 67 (1997) (declining to find supervisory status where charge nurses had authority to suspend employees for flagrant violations such as drunkenness or abuse of patients).

Accordingly, I find that the Employer has not met its burden of establishing that RNs have the authority to exercise independent judgment to suspend employees.

#### **F. Secondary Indicia**

The existence of secondary indicia, such as title and higher pay, standing alone, is insufficient to demonstrate supervisory status. The Board has long held that job titles and descriptions prepared by employers are not controlling. "[R]ather, the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor." *Oakwood Healthcare*, 348 NLRB at 690 fn. 24. Here, in addition to the job title, job description, and higher hourly rate of pay, the Employer posits that the holding of certain keys, taking Sexual Harassment Prevention training, the asserted singular authority to allow after-hours entrance, and the ratio of employees to supervisors is additional evidence of the RNs' statutory authority.<sup>20</sup> I find these secondary indicia are insufficient to establish supervisory authority.

Moreover, the Employer argues that RNs are supervisors because they are the highest ranking employees on duty at the facility during nights and weekends. Service as the highest-ranking employee on duty is a secondary indicium of supervisory status and is, in the absence of evidence that the purported supervisors have the authority with

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<sup>20</sup> The Employer's asserts that the DON and ADON could be supervising up to 65 employees if RNs are not found to be supervisors.

respect to the twelve factors set out in Section 2(11), insufficient to demonstrate supervisory status. *Loyalhanna Care Center*, 352 NRLB 863, (2008) (nurse managers found not supervisors despite fact that they were highest ranking employees on duty for 14-16 hours per day). The Board gives such evidence even less weight when a higher ranking official, such as the DON in the instant case, is available on call. *Id.*; *Golden Crest Healthcare Center*, 348 NLRB at 730, n.10. In addition to the DON being available at all times by telephone, the record also reflects that the RNs have contacted the Administrator during the night or evening shifts to report incidents involving abuse. Accordingly, the fact that RNs are regularly the highest ranking employee at the facility is insufficient to establish that they are supervisors within the meaning of the Act.

Based on my conclusions above that the Employer has not shown by a preponderance of evidence of the primary indicia of Section 2(11) authority, the above-mentioned job description, title, salary, and other asserted secondary indicia are not dispositive.

## V. CONCLUSION

On the basis of the foregoing and the record as a whole, I find that the RNs are not supervisors within the meaning of Section 2(11) of the Act, as amended, and should be included in the bargaining unit.

## DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting unit found appropriate above. The employee will vote whether or not they wish to be represented for purposes of collective bargaining by **Service Employees International Union, Local 121RN**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### *Voting Eligibility*

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

***Employer to Submit List of Eligible Voters***

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all eligible voters. *North Macon Health Care Facilities*, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064, on or before **January 17, 2013**.

No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted to the Regional office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>21</sup> by mail, by hand or courier delivery, or by facsimile transmission at (310) 235-7420. The burden of establishing the timely filing and receipt of these lists will continue to be placed on the sending party. Since the lists will be made available to all parties to the election, please furnish **two** copies, unless the lists are submitted by facsimile or e-filing, in which case no copies need be submitted. If you have questions, please contact the Regional Office.

### ***Notice of Posting Obligations***

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the Election Notice.

### ***Right to Request Review***

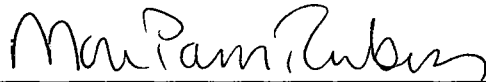
Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by **January 24, 2013**. The request be filed

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<sup>21</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **Cases & Decisions** tab. Then click on the **File Case Documents** link on the menu, and follow the detailed directions.

electronically through the Agency's web site, [www.nlr.gov](http://www.nlr.gov),<sup>22</sup> but may not be filed by facsimile.

DATED at Los Angeles this 10<sup>th</sup> day of January, 2013.

A handwritten signature in black ink, reading "Mori Pam Rubin", written over a horizontal line.

Mori Pam Rubin, Regional Director  
National Labor Relations Board  
Region 31

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<sup>22</sup> To file the request for review electronically go to [www.nlr.gov](http://www.nlr.gov) and select the **Cases and Decisions** tab. Then click on the **File Case Documents** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located on the Agency's website, [www.nlr.gov](http://www.nlr.gov).